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No. 82-708

IN THE

Supreme Court of the United States

October Term, 1982

SUMMA CORPORATION,

Petitioner,

v.

STATE OF CALIFORNIA ex rel. STATE LANDS COMMISSION and CITY OF LOS ANGELES,

Respondents.

On Writ of Certiorari to the Supreme Court of California

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

The Treaty of Guadalupe Hidalgo, ending the Mexican-American War and ceding California to the United States, required that the property rights of former Mexican citizens in the acquired territory "shall be inviolably respected." In keeping with the United States' commitment under the treaty, Congress passed the Act of March 3, 1851 "to ascertain and settle the private Land Claims in the State of California." Under the 1851 Act, an 1839 Mexican grant to petitioner's predecessors was confirmed as valid, and a federal patent issued without qualification or reservation. The court below, however, held that California, upon admission to the Union, had obtained from the United States an expansive "public trust" property interest in the Mexican grant land. This purported state interest would preclude virtually all uses by petitioner of the shallow wetlands involved. In these circumstances, the questions presented are:

1. When the United States pursuant to its treaty obligation confirmed a Mexican land grant and patented the land to private parties without qualification, did it silently reserve a "public trust" property interest, to which the State of California succeeded?

2. After a factual determination has been made in an 1851 Act patent proceeding that the Mexican grant land was not tidelands, may the State of California collaterally attack that finding?[1]

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[1] In the California Supreme Court, this case was entitled *City of Los Angeles v. Venice Peninsula Properties.* The suit was instituted by the City of Los Angeles against Ethel Fraser Carmen-Ryles; Robert D. Byrne and Byrne C. Manson, as Trustees under the Will of Olive Byrne Jones, Deceased; Fraser's Million Dollar Pier Company; United California Bank, as Trustee under the Will of Herbert Richmond Gage; Ruth Jones Wright; Hughes Tool Company (now Summa Corporation); the State of California and one thousand Doe defendants. Southern California Gas Company was added as defendant Doe 1. Venice Peninsula Properties succeeded to the interests of Ethel Fraser Carmen-Ryles, Fraser's Million Dollar Pier Company and United California Bank and was substituted as the first-named defendant

below. The State of California was named as a defendant because of a provision of California law that makes the State a necessary party to any action by a city involving "the title to or boundary of tidelands." Cal. Pub. Res. Code § 6308. The City claimed to be the present owner of a "public trust" easement in petitioner's property. The State supported the City's claim, and filed a cross-complaint against the other defendants alleging that the State had owned a "public trust" interest in the property, which it had granted to the City. All of the defendants except Southern California Gas Company stipulated to be bound by the outcome of the litigation between respondents and Summa Corporation. As a result, they did not actively participate in the proceedings below. Southern California Gas Company, the owner of a pipeline easement across petitioner's land, no longer has an interest in the outcome of this proceeding because of the concession by respondents that the company would be entitled to compensation for any damage to its facilities resulting from any exercise of the State's "public trust" rights.

Petitioner Summa Corporation is part of a privately held interconnected network of corporations, the whole of which is owned 100 percent by the Estate of Howard R. Hughes. Neither Summa Corporation nor its parent, subsidiary, or affiliated companies has any shareholder other than the Estate of Howard R. Hughes and other affiliated corporations, which are ultimately owned 100 percent by the Estate of Howard R. Hughes.

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BRIEF OF PETITIONER

OPINIONS BELOW

The opinion (and dissents) of the Supreme Court of California to which the writ is addressed, affirming the trial court, appears at 31 Cal. 3d 288, 182 Cal. Rptr. 599, 644 P.2d 792 (1982). The opinion (and dissent) of the state Court of Appeal, reversing the trial court, appears at 172 Cal. Rptr. 619 (1981). That opinion was superceded when the California Supreme Court granted a hearing, and was not published in the official report. *See* Cal. Rules of Court, Rule 976(d) (1972). The findings of fact and conclusions of law of the state trial court, entered on February 22, 1977, and the judgment it entered on October 11, 1977, are unreported. All of these opinions and orders are reproduced in the Appendix to the petition for certiorari.

JURISDICTION

The opinion of the California Supreme Court was entered on May 10, 1982. A timely petition for rehearing was filed, and was denied on June 16, 1982. By order of August 26, 1982, petitioner's time to file a petition for a writ of certiorari was extended to October 22, 1982, and the petition was filed on that date. On March 21, 1983, this Court granted the petition for certiorari, and on April 14, 1983, petitioner's time to file its brief on the merits was extended to June 6, 1983. This Court has jurisdiction under 28 U.S.C. § 1257(3).

TREATY AND STATUTE INVOLVED

Treaty of Guadalupe Hidalgo, 9 Stat. 922 (1848).

Act of March 3, 1851 "to ascertain and settle the private Land Claims in the State of California," 9 Stat. 631 (1851).

The Treaty and the Act of 1851 are reproduced in the Appendix to the petition for certiorari.

STATEMENT OF THE CASE

A. The Property In Dispute And The Origin Of Petitioner's Title.

The property in issue is a shallow and narrow body of water, known as Ballona Lagoon, located in the Marina del Rey area of Los Angeles, California, an area "largely, or entirely, under urban development."[2] (R.T. 286.)[3] Ballona Lagoon lies generally parallel to and approximately 300 yards inland from the shore of the Pacific

[2] Appended hereto is a contemporary map of this area on which the State Lands Commission's line designating "where the public trust may exist" has been superimposed. Ballona Lagoon is labelled and shown in blue just to the left of the center of this map.

[3] "R.T." refers to the Reporter's Transcript on Appeal of the trial proceedings; "Pl. Ex." and "D. Ex." to the exhibits introduced into evidence at trial by plaintiffs and defendants, respectively; "C.T." to the Clerk's Transcript on Appeal in the state court; "P.A." to the Appendix to the petition for writ of certiorari; and "J.A." to the Joint Appendix filed herewith.

Ocean; it is separated from the ocean by a barrier beach.[4] (Pl. Ex. 74; R.T. 729, 784.) As a result of governmental condemnations in 1940 and 1959, the lagoon is bisected both by a flood control channel and by a dredged entry channel connecting the nearby Marina del Rey harbor with the Pacific Ocean. (D. Exs. E & G; R.T. 850-877.)

These projects have left a very small pond or lagoon remnant on the southerly side and a somewhat larger one on the northerly side (Ballona Lagoon). The latter, which constitutes the property in issue,[5] was placed in flowage communication with the Marina del Rey harbor entry channel as part of the construction of that project in the early 1960's. The communication takes place by means of a pipe connected to a motorized tide gate. (C.T. 564, 778, 796.) The Ballona Lagoon remnant is approximately 1,500 yards long, 25 yards wide, and at mean high tide the water is one to six feet deep.[6] (R.T. 628-630; Pl. Ex. 66; R.T. 617, 660; Pl. Ex. 74; R.T. 729, 784.) At low tide it is virtually dry. (R.T. 662.)

Petitioner's title, like that to all the land in the Marina del Rey area, is derived from an 1839 Mexican grant of "Rancho La Ballona" to Agustin and Ignacio Machado

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[4] The contemporary Ballona Lagoon is part of the remains of a larger wetlands and marsh area also sometimes referred to on older maps as Ballona Lagoon. *See, e.g.*, 1887 United States Coast and Geodetic Survey map, Pl. Ex. 14. (J.A. 123.)

[5] Petitioner owns one of the two lots which together constitute Ballona Lagoon. The owners of the second lot were also named as defendants below, but by stipulation agreed to be bound by the outcome of the litigation against petitioner. *See* note 1, *supra*. *See also* P.A. A67.

[6] It was admitted at trial (C.T. 986) that the waters are not navigable in commerce, which is the federal test of navigability for Equal Footing purposes, *United States v. Oregon*, 295 U.S. 1, 14-15 (1935), and that they are not navigable in interstate commerce, which is the federal test of navigability for the Commerce Clause servitude. *Kaiser Aetna v. United States*, 444 U.S. 164, 178-179 (1979). The trial court found that at high tide the waters within the lagoon are navigable by "rowboats, canoes, surfboards and other shallow-draft craft" (P.A. A52), but this limited navigability may be the result of the dredging of the Marina del Rey entry channel and the installation of the motorized tidegates. Significantly, there was no finding that the land was navigable, even by recreational craft, at the time of California's statehood.

and Felipe and Tomas Talamantes, citizens of Mexico.[7] (J.A. 4-6). Armed conflict between Mexico and the United States began early in 1846. The conquest of California was virtually complete on July 7, 1846, when Monterey was occupied, and all fighting ended with the fall of Mexico City to American troops on September 14, 1847. The Treaty of Guadalupe Hidalgo, signed on February 2, 1848 and ratified by the Senate on May 10, 1848, marked the formal end of the state of war between the United States and Mexico.

As part of the peace treaty, Mexico ceded California to the United States. (Art. V; P.A. A93-A94.) In return, the United States agreed that the property rights of Mexicans in the newly-acquired territory "shall be inviolably respected." (Art. VIII; P.A. A96.) In accordance with the treaty obligation, on March 3, 1851 Congress passed "An Act to ascertain and settle the private Land Claims in the State of California," whose purpose was to determine conclusively what was private property and thus not part of the public domain belonging to the United States upon the cession. (P.A. App. B-2.) The Act established a board which, by applying the "laws, usages, and customs" of Mexico (§ 11; P.A. A111), was to decide upon the validity of claims to land derived from that country.

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[7] The Mexican title documents show the steps taken in granting Rancho La Ballona. (J.A. 1-6.) The Machados and Talamantes petitioned the Governor of the Department of the Californias for the grant in 1839, eighteen or nineteen years after they first took possession of the Rancho. (J.A. 1.) The request was referred to the committee on unoccupied lands of the City Council of Los Angeles to determine if the land "was vacant, and could be granted without injury to third persons or the public. . . ." S. Ex. Doc. No. 18, 31st Cong., 2d Sess. 3 (1851). (*See also* J.A. 213.) The committee reported that "they find no obstacle" to the grant. (J.A. 2.)

The judicial possession, "the judicial proceeding of walking the boundaries" (J.A. 213), was completed on December 31, 1839. (J.A. 8-11.) It established the "sea-coast" as one of the boundaries of Rancho La Ballona. (J.A. 11.) According to Señor Laffan, the Mexican law expert, the judicial possession for Rancho La Ballona was performed in complete accord with governing Mexican Law. (J.A. 214, 217, 219.) The judicial possession was conclusive under Mexican law and upon the United States. *United States v. Pico*, 72 U.S. (5 Wall.) 536, 539 (1866).

On October 2, 1852, the Mexican grantees of Rancho La Ballona filed a petition for confirmation of their title under the Act of 1851. (J.A. 19-20.) After hearing, the petition was granted by the Board of Land Commissioners in 1854 (J.A. 21) and affirmed by the United States District Court on appeal in 1855. (J.A. 22-33.) In accordance with the 1851 Act, a survey of the confirmed claim was prepared in 1858, approved by the Surveyor General of California, and submitted to the General Land Office of the United States Department of the Interior for issuance of a patent. (J.A. 26.)

The survey thus submitted established the shore of the Pacific Ocean as one boundary of the Rancho. (J.A. 26.) The General Land Office, however, declined to approve the survey, noting that it included within the Rancho an area just inland from the ocean which was labeled "inner bay." The Land Office remanded the survey to the Surveyor General with directions that "unless good cause be shown to the contrary," the survey be amended to substitute the landward shore of the "inner bay" as the boundary instead of the shore of the ocean. (J.A. 32-34.) The survey of Rancho La Ballona was subsequently published twice (*see* J.A. 35, 37), and a protest against La Ballona's ocean and northern boundaries was filed in 1869 by the claimants of the rancho to the north. (J.A. 39-49.)

In the proceedings that followed, the Mexican grantees of Rancho La Ballona presented affidavits that the "inner bay" was not an "arm of the sea" but rather pasture land intermittently overflowed with fresh water in times of storms when sand blocked an adjacent creek's outlet to the ocean. (J.A. 55, 58, 60.) Based upon this submission, as well as the survey field notes and the underlying Mexican *diseño* (map),[8] the General Land Office ultimately determined that the "inner bay" was not an arm of the sea and withdrew its earlier objection to the survey's ocean boundary. (J.A. 84-94.) The survey was thereafter approved by the Secretary of the Interior (J.A. 100), and in 1873 a patent issued confirming title

[8] The *diseño* appears at J.A. 7.

to the rancho, including the "inner bay," in the Mexican grantees (J.A. 101-109.)

At no time during the 1851 Act proceedings was it asserted that California or anyone other than the Machados and Talamantes owned any interest in Rancho La Ballona, and the patent reserved no such interest.

B. Parties And Proceedings Below.

This action was commenced in the Los Angeles County Superior Court on September 13, 1965, when the City of Los Angeles filed a Complaint for Declaratory Relief and to Quiet Title to two parcels of land which together constitute the larger lagoon remnant of "Ballona Lagoon." (C.T. 1-14.) Named as defendants were all of the individuals and entities then having an interest of record in either parcel.[9]

The City alleged that it was the owner of a "public trust" interest in the property. It claimed to be the grantee of the State of California,[10] which allegedly received the interest on statehood "by virtue of its sovereignty." (C.T. 4.) The State subsequently filed a cross-complaint supporting and reiterating the City's allegations. (C.T. 115-120.)

At the time of filing its Complaint, the City sought to establish the "public trust" interest in order to avoid paying just compensation for dredging the property as part of the then-contemplated construction of a small craft waterway system in some adjacent decaying canals. (C.T. 5; D. Exs. N-2, N-3, N-14; R.T. 907, 920, 933.) However, by the time of trial almost ten years later, that project had been abandoned. Accordingly, the City's purpose

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[9] These parties are identified in note 1, *supra*.

[10] By Chapter 77, Statutes of California, 1917, all interest held by the State of California, by virtue of its sovereignty, in tidelands within the boundaries of the City of Venice, a predecessor of the City of Los Angeles, was granted to the City. The Statute, however, contains the express proviso "that nothing contained herein shall in any way affect any property held or claimed under, through or from a Mexican grant or patent therefor. . . ." This proviso reflected the common understanding that areas within Mexican grants were excluded from the property received by California upon its admission to the Union. *See* pp. 9-10, *infra*.

in seeking the "public trust" decree at trial was to establish public access to petitioner's land and to require its preservation as open space. (C.T. 448, 796.)

Following a bench trial, on November 18, 1975, the trial court announced its intended decision in favor of petitioner and against the City and the State on every claim, including the asserted "public trust" interest. (C.T. 477-479.) Seven months later, the trial court "informally" stated that it intended to vacate its prior notice of intended decision (C.T. 485), and on October 19, 1976, issued a "revised" notice of intended decision in favor of the City and the State. (C.T. 492-494.)

Thereafter, the trial court entered findings of fact which found that the property had been a tidal "arm of the Pacific Ocean" at all relevant times. (P.A. A52.) Although the trial court found that title to the property had been confirmed in petitioner's predecessors under the Act of 1851 (P.A. A58), it further found that under Mexican law the original grantees had not obtained any property interest in the land.[11] (P.A. A54.) The trial court entered judgment on October 11, 1977, decreeing the land subject to a "trust" easement held by the State of California "for the People of the State."[12] (P.A. A68.)

On petitioner's appeal, the judgment was reversed by the Court of Appeal, California's intermediate appellate court, on March 25, 1981. (P.A. App. A-4.) With one judge dissenting, the Court of Appeal found that the

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[11] The trial court's finding that under Mexican law petitioner's predecessors had no property interest in the land is so far out of line with the controlling decisions of this Court (*see* p. 15 & note 23, *infra*) that on appeal the State did not urge that position and the state supreme court did not adopt it.

[12] The trial court judgment also awarded the City several easements under various state law theories of express and implied dedication. (P.A. A68-A69.) The California Supreme Court did not reach that part of the judgment, finding that the uses which such easements supported were "included within the public trust." (P.A. A16; 31 Cal. 3d at 203, 182 Cal. Rptr. at 608, 644 P.2d at 801.) Since the California Supreme Court decided the case on federal grounds, this Court has jurisdiction without regard to any state grounds which were not reached. *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 98 (1938).

"public trust" doctrine was applicable only to those lands to which the State of California had once held title. (P.A. A40.) Relying on the decisions of this Court, it held that California had not, on statehood, succeeded to any property interest in lands subject to previous Mexican grants, and that the federal patent issued to petitioner's predecessors was conclusive of California's claim. (P.A. A42-A44.)

The California Supreme Court granted a hearing in the case on May 21, 1981, thus superceding the decision of the Court of Appeal. *See* Cal. Rules of Court, Rule 976(d) (1972). By a decision filed on May 10, 1982, it affirmed the trial court's "public trust" decree. The supreme court believed that the "inner bay" depicted on the United States patent survey was an "arm of the Pacific Ocean" which had continually existed as such for more than 900 years; it therefore held that the presently existing "Ballona Lagoon" was tidelands at the time California entered the Union. (P.A. A7 & note 6.)[13]

The supreme court reached the conclusion that petitioner's land is burdened with a "public trust" interest by holding that Mexico had impliedly reserved such an interest in the property (P.A. A8-A9),[14] that this interest had passed to the United States on Mexico's cession of California (P.A. A9-A10),[15] that the United States had silently reserved that interest from its 1851 Act patent to petitioner's predecessors (P.A. A15),[16] and that on admission to the Union, California succeeded to the United States' reserved interest as an incident of sovereignty. (P.A. A15.)[17] Two justices filed separate dissents from the four-justice majority opinion. (P.A.

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[13] 31 Cal. 3d at 296, 182 Cal. Rptr. at 604, 644 P.2d at 796-797. The California Supreme Court decision appears in Appendix A-1 to the petition for certiorari. All citations will be to the appendix with footnotes supplying the parallel citations to the published reports.

[14] 31 Cal. 3d at 297, 182 Cal. Rptr. at 604-605, 644 P.2d at 797-798.

[15] *Id.* at 297-298, 182 Cal. Rptr. at 605, 644 P.2d at 798.

[16] *Id.* at 302, 182 Cal. Rptr. at 608, 644 P.2d at 801.

[17] *Id.*

A16, A30.)[18] The court denied petitioner's request for rehearing on June 16, 1982. (P.A. A33.) This Court granted the petition for certiorari on March 21, 1983.

C. The Equal Footing Doctrine And Mexican Land Grants.

While the Mexican grantees of Rancho La Ballona were in quiet possession of the Rancho, on September 9, 1850, California was admitted into the Union "on an equal footing with the original States in all respects whatever." 9 Stat. 452 (1850). With this Court's earlier decision in *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845), it had become settled that by reason of its sovereignty each newly admitted state was entitled to fee simple ownership of the beds of its tidal waters under the Equal Footing Doctrine. *See also Weber v. Board of Harbor Commissioners*, 85 U.S. (18 Wall.) 57, 65-66 (1873).

In the case of California, however, the United States had a paramount duty under the Treaty of Guadalupe Hidalgo to protect the property rights of former Mexican citizens. Accordingly, it soon became established law that the right of California to ownership of its tidelands was subordinate to the rights of prior Mexican grantees of tidelands, and that tidelands subject to such grants did not pass to the State under the Equal Footing Doctrine. *State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 375 (1977) ("Where Mexico had patented tidal lands to a private owner before ceding to the United States the territory which ultimately became the State of California, California did not succeed to the ownership of such lands upon her admission to the Union"); *United States v. Coronado Beach Co.*, 255 U.S. 472, 487-488 (1921); *Knight v. United States Land Association*, 142 U.S. 161, 183-184 (1891).

Even before this Court enunciated the principle — and while the confirmation proceedings for Rancho La Ballona were still underway — the California Supreme Court

[18] *Id.* at 303, 315, 182 Cal. Rptr. at 608, 616, 644 P.2d at 801, 809.

declared in 1867 that no interest in private Mexican grant lands passed to the State under the Equal Footing Doctrine. *Ward v. Mulford*, 32 Cal. 365, 371-372 (1867). *See also Teschemacher v. Thompson*, 18 Cal. 11, 27-28 (1861).

D. California's "Public Trust" Property Interest.

California determined early on that her title to Equal Footing tidelands was held in trust for the people of the State for purposes of commerce, navigation and fishing. *See Eldridge v. Cowell*, 4 Cal. 80, 87-88 (1854). Notwithstanding this court-imposed trust, the California legislature enacted a number of statutes providing for extensive sales of publicly owned tidelands during the early years of statehood. Up until 1913 the state supreme court held that such tideland sales either passed absolute title, *e.g.*, *Friedman v. Nelson*, 53 Cal. 589 (1879); *Holladay v. Frisbie*, 15 Cal. 634 (1860); *Eldridge v. Cowell, supra*, or no title. *E.g.*, *Kimball v. MacPherson*, 46 Cal. 103 (1873) (sale made without regard to any trust purpose); *Taylor v. Underhill*, 40 Cal. 471 (1871); *People v. Morrill*, 26 Cal. 336 (1864).

People v. California Fish Co., 166 Cal. 576, 138 P. 79 (1913), made a break with past California law. Although asked to declare certain tideland sales void, the California Supreme Court held instead that such sales conveyed fee title to the land, but did not convey the State's "public trust" interest. Thus, the private owner received only "naked title to the soil." *Id.* at 598, 138 P. at 88. Through its "public trust" interest, the State was held to have retained the right "to enter upon and possess" the land, to make "changes and improvements" for "the preservation and advancement of the public uses," *id.* at 599, 138 P. at 88, and to afford the public the "right of free access." *Id.* at 589, 138 P. at 84.

From its inception in *California Fish Co.*, the "public trust" doctrine has been aggressively enlarged by decisions of the California Supreme Court, culminating in the case now under review. The "public trust" property interest is held to exist by virtue, not of the present

condition of the land, but its historical character as tidelands in 1850 when California was admitted to the Union. *Newcomb v. City of Newport Beach*, 7 Cal. 2d 393, 399, 60 P.2d 825, 829 (1936); Parker, *History, Politics and the Law of the California Tidelands Trust*, 4 WEST ST. U.L. REV. 149, 152 (1977). Moreover, it is said to persist despite the lawful reclamation and filling of the lands so that they are no longer tidelands. *City of Long Beach v. Mansell*, 3 Cal. 3d 462, 486-487, 91 Cal. Rptr. 23, 40, 476 P.2d 423, 440 (1970); *Atwood v. Hammond*, 4 Cal. 2d 31, 41, 48 P.2d 20, 24 (1935).[19]

Although initially expressed in terms of commerce, navigation and fishing, the permissible uses of the state's retained "public trust" interest have been vastly expanded by the California Supreme Court in recent years. Approved "public trust" uses include the preservation of the land as "open space," *Marks v. Whitney*, 6 Cal. 3d 251, 259-260, 98 Cal. Rptr. 790, 796, 491 P.2d 374, 380 (1971), the construction of a YMCA building, *People v. City of Long Beach*, 51 Cal. 2d 875, 338 P.2d 177 (1959), and drilling for oil.[20] *Boone v. Kingsbury*, 206 Cal. 148, 273 P. 797 (1928).

The power of the State in administering this broad "public trust" has been termed "absolute." *Marks v. Whitney, supra*, 6 Cal. 3d at 260, 98 Cal. Rptr. at 796, 491 P.2d at 380. It includes the right "to enter upon and possess," *People v. California Fish Co., supra*, 166

[19] The "public trust" interest is distinct from and broader than the public right to traverse and fish navigable waters covering privately owned lands so long as the waters remain navigable. *See Bohn v. Albertson*, 107 Cal. App. 2d 738, 741, 238 P.2d 128, 131 (1951). This public right in navigable waters exists without regard to the character of the land at the time of statehood and, reflecting the lack of any state property interest, the public's rights in this respect automatically terminate on the land's loss of its navigable character. *Id.* at 757, 238 P.2d at 140.

[20] By contrast, the federal navigational servitude, "which exists by virtue of the Commerce Clause in navigable streams," only "gives rise to an authority in the Government to see that such streams retain their capacity to serve as continuous highways for the purpose of navigation in interstate commerce." *Kaiser Aetna v. United States*, 444 U.S. 164, 177 (1979).

Cal. at 599, 138 P. at 88, and to make physical changes to the property, *Newcomb v. City of Newport Beach, supra*, 7 Cal. 2d at 401, 60 P.2d at 829, and to determine, to the exclusion of the private owner, what use will be made of the land. Taylor, *Patented Tidelands: A Naked Fee?* 47 CAL. ST. B.J. 420, 485-486 (1972). Conversely, the private owner cannot restrain members of the public from "lawfully asserting or exercising public trust rights on these privately owned tidelands." *Marks v. Whitney, supra*, 6 Cal. 3d at 261, 98 Cal. Rptr. at 796-797, 491 P.2d at 380-381.

Thus, the "public trust" interest which the state court has now purported to extend to Mexican grant lands is a permanent estate in land. It is not dependent upon the present condition of the land, but upon the theory that it was received by California on statehood under the Equal Footing Doctrine. It accordingly permits the State to utilize non-navigable and even dry land to the exclusion of the "fee" owner.

SUMMARY OF ARGUMENT

1. The Treaty of Guadalupe Hidalgo required that the property rights of former Mexican citizens in California "shall be inviolably respected." In the Act of March 3, 1851, the United States established a Board of Land Commissioners to carry out its treaty obligation. The Act directed the Board to apply the "laws, usages, and customs" of Mexico. The legislative history shows that the 1851 Act procedure was intended to provide a conclusive determination of what was the private property of former Mexican grantees and not part of the public domain.

The title of the former Mexican grantees of the property in question here was confirmed by the Board of Land Commissioners in 1854. The required survey of the property was finally approved by the General Land Office and the Secretary of the Interior in 1873, and the patent issued that year without reservation or qualification.

More than a century later, the California Supreme Court has purported to overturn property rights thought

to have been firmly settled under the 1851 Act procedure. While it recognized that petitioner's title to the property could not be dislodged, the court achieved virtually the same result by simply carving out a concurrent property interest which it denominated a "public trust" easement. The State's asserted "public trust" easement is an expansive and permanent property interest which extinguishes fundamental aspects of private ownership. It gives the State the right to possession, to develop or not develop the land, and to control access or (as in this case) to require that the property be preserved as "open space."

California's effort to carve out this "public trust" property interest (which it claims the United States received from Mexico and passed to the State under the Equal Footing Doctrine) is incompatible with the purposes of the Treaty of Guadalupe Hidalgo and the Act of 1851. In accordance with the treaty, it is settled that lands within Mexican grants did not pass to the State under the Equal Footing Doctrine. *Knight v. United States Land Association*, 142 U.S. 161, 183-184 (1891).

The 1851 Act proceedings were intended to be conclusive against the United States and all those (like California) claiming under the United States. *United States v. O'Donnell*, 303 U.S. 501, 512-513 (1938). The conclusiveness of 1851 Act patents against belated assertions of conflicting rights was upheld by this Court in two closely analogous cases. *Barker v. Harvey* 181 U.S. 481 (1901); *United States v. Title Insurance Co.*, 265 U.S. 472 (1924) (Indian rights of perpetual occupancy). To hold now that the United States somehow secretly reserved rights in petitioner's land, and then conveyed those rights to California under the Equal Footing Doctrine would upset long-established titles that the Act of 1851 was intended to settle conclusively.

2. An independent reason for reversal is the determination by the General Land Office of the United States Department of the Interior in the 1851 Act proceedings that the property involved was not an arm of the sea and

thus not tidelands at the time of California's admission to the Union. California's attempt to re-open that question at this late date overlooks the fact that in the 1851 Act proceedings, the character of the land was squarely placed in issue. The original survey of the property was remanded for reexamination of that precise question, and upon the taking of additional evidence, the General Land Office and thereafter the Secretary of the Interior ruled unambiguously that the property involved, although identified as "inner bay" on the survey map, was not an "arm of the sea." This determination of fact is not subject to collateral attack after the patent has been issued. *Burke v. Southern Pacific R.R. Co.*, 234 U.S. 669, 691-692 (1914).

ARGUMENT

I. THE PATENT ISSUED PURSUANT TO THE TREATY OF GUADALUPE HIDALGO AND THE 1851 ACT PRECLUDES CALIFORNIA'S ASSERTED "PUBLIC TRUST" PROPERTY INTEREST.

A. Introduction.

Following the line of the Spanish missions stretching from San Diego to Sonoma north of San Francisco, most of the land along the California coast is located within former Mexican ranchos or pueblos. At the time of consideration of the Treaty of Guadalupe Hidalgo and the Act of 1851, Congress was well aware that most of these lands were owned by private parties. H.R. Ex. Doc. No. 50, 30th Cong., 2d Sess. 45 (1849); S. Ex. Doc. No. 18, 31st Cong., 2d Sess. 34 (1851). In the treaty the United States undertook to protect the private property of former Mexican citizens in California and in the Act Congress established procedures to review and confirm pre-existing private ownership.

Thereafter, for more than 100 years, land titles in former Mexican grants in California were established by reference to federal patents issued under the Act of 1851. It was a rule of property that interests not appearing on the face of the patent could not exist to impair that title. *United States v. Title Insurance Co.*, 265 U.S.

472 (1924). It was also settled that tidelands or wetlands within a Mexican grant did not pass to the State under the Equal Footing Doctrine. *Knight v. United States Land Association*, 142 U.S. 161, 183-184 (1891). Prior to the present case, the California courts had never suggested that the State owned any interest in wetlands which were patented to private Mexican grantees and which had never been owned by the State in fee.[21] (P.A. A10.)[22]

The central vice of the decision below is that it overturns property rights in patented Mexican grant lands thought to have been firmly settled in the nineteenth century. In its departure from prior precedents, the California Supreme Court felt compelled to recognize that under this Court's controlling decisions,[23] petitioner's title to wetlands within a confirmed Mexican grant could not be dislodged. However, the California court achieved virtually the same result by simply carving out a concurrent property interest which it denominated a "public trust" easement rather than a fee.

The State's asserted "public trust" easement is an expansive and permanent property interest which extinguishes fundamental aspects of private ownership. *See* pp. 10-12, *supra*. It would permit the State "to enter upon and possess" petitioner's land, to construct improvements on it, to afford public access and even to "preserve" the land in its natural state as open space without payment of compensation.[24] In exercising its "public trust" rights,

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[21] Indeed, no prior decision had suggested that any state received any property interest less than a fee under the Equal Footing Doctrine. On the contrary, the Equal Footing Doctrine has always been expressed in terms of "title to" and "absolute property in" the tidelands conveyed by the United States upon statehood. *See, e.g., Weber v. Board of Harbor Commissioners*, 85 U.S. (18 Wall.) 57, 65 (1873).

[22] 31 Cal. 3d at 298-299, 182 Cal. Rptr. at 605, 644 P.2d at 798.

[23] *E.g., United States v. Coronado Beach Co.*, 255 U.S. 472 (1921); *Knight v. United States Land Association*, 142 U.S. 161 (1891); *Beard v. Federy*, 70 U.S. (3 Wall.) 478 (1865).

[24] The scope of the State's asserted "public trust" interest is illustrated by this very case. While the City of Los Angeles initially asserted a right to dredge the shallow lagoon, the dredging project was abandoned by the time of trial, and the City now seeks to preserve the property as "open space." (C.T. 448, 796.)

the State has "absolute" power over the land. The State, not the private owner, is entitled to possession; the State, not the private owner, is entitled to develop (or not develop) the land; and the State, not the private owner, is entitled to control access. Thus, the California Supreme Court has now held that the State owns the same interest in these patented private Mexican grant lands that the court previously held the State "retained" upon alienation of tidelands which the State received as "absolute property" under the Equal Footing Doctrine.

As we shall show, the patent issued pursuant to the Treaty of Guadalupe Hidalgo and the Act of 1851 conclusively established the title of the Mexican grantees and cannot be undermined at this late date by carving out a state "public trust" property interest.[25]

B. The Treaty of Guadalupe Hidalgo Requires That The Property Of Former Mexican Citizens Be Protected.

In the Treaty of Guadalupe Hidalgo the United States undertook a special responsibility to honor and protect the property rights of Mexicans in the acquired territory. *See* H.R. REPT. No. 45, 40th Cong., 2d Sess. 2 (1868). Article VIII of the treaty required that "property of

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[25] The conclusiveness of the 1851 Act proceedings on such questions makes it unnecessary to consider whether under Mexican law the title of petitioner's predecessors to a rancho which included wetlands was burdened with some public servitude. The court below said it was "not aware of any authority" on the question whether such a servitude existed under nineteenth century Mexican law, but simply "assume[d]" that there was such a rule. (P.A. A9; 31 Cal. 3d at 297, 182 Cal. Rptr. at 604, 644 P.2d at 797.) Such an assumption is not only a weak foundation upon which to build a judicial decision, it is highly doubtful. Nothing on the face of the Mexican grant supports such an assumption. Such a broad public property interest was plainly not withheld by the standard stipulation in the Mexican grant that the grantee could enclose the rancho "without prejudice to the traversing roads and servitudes." *See United States v. Coronado Beach Co.*, 255 U.S. 472, 485-486 (1921); *Barker v. Harvey*, 181 U.S. 481, 499 (1901). *See also*, notes 30 and 32, *infra*. In any event, the Board of Land Commissioners was empowered to decide the scope of the grant under the "laws, usages, and customs" of Mexico and confirmation of unqualified title in petitioner's predecessors is binding. *See* pp. 21-23, *infra*.

every kind . . . shall be inviolably respected." (Art. VIII; P.A. A96.)

The protocol of May 26, 1848, which preceded the exchange of ratifications on May 30, 1848 and interpreted the treaty, reaffirmed that Mexican grants prior to the cession "preserve the legal value which they may possess; and the grantees may cause their legitimate titles to be acknowledged before the American tribunals." 5 H. MILLER (ED.), TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 381 (1937). As this Court said in *Peralta v. United States*, 70 U.S. (3 Wall.) 434, 439 (1865):

> "The Treaty of Guadalupe Hidalgo imposed the obligation on this government to protect titles to land in California acquired under Mexican rule. The country was new, and rich in mineral wealth, and attracted settlers, whose industry and enterprise produced an unparalleled state of prosperity. The enhanced value given to the whole surface of the country by the discovery of gold, made it necessary to ascertain and settle all private land claims. . . ."

See also United States v. Moreno, 68 U.S. (1 Wall.) 400, 404 (1863).

At the time the treaty was signed, it was recognized that large tracts of the best land in California (including that along the coast) had been granted to private parties and that the United States was bound to respect those grants. During a debate in the House of Representatives on subsequently proposed legislation to protect bona fide purchasers of lands, title to which was initially confirmed to private parties but later rejected by this Court, Congressman Phelps of California said:

> "Before our acquisition of California, the Spanish and Mexican Governments had made grants of large tracts of land throughout the State, embracing the most favorable locations, immediately on the coast and along the bays, rivers, and navigable streams. By the treaty of Guadalupe Hidalgo, signed on the 2d of February, 1848, the Government of the United States

agreed 'o respect the titles to land and property of the former citizens of Mexico."[26] CONG. GLOBE, 37th Cong., 2d Sess. 2639 (1862).

By its terms and under international law, the treaty's protection of private property (Article VIII) was self-executing and therefore subsequent legislation was not necessary to make it binding as the domestic law of the United States. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 141(1) (1965).[27] However, in order to ensure that Mexican grantees would not be subject to endless litigation challenging their rights to their property, Congress enacted legislation to provide a procedure for settling land claims in California once and for all, as we shall see in the next section.

C. The Act Of 1851 Was Designed To Separate Private Property From The Public Domain.

The mechanism that the United States established to carry out its treaty obligation that Mexican property rights "shall be inviolably respected" was the Act of March 3, 1851. (P.A. App. B-2.) The Act's author, Senator Gwin of California, described the relationship between the Act and the Treaty of Guadalupe Hidalgo in the following terms:

> "Under it [the Act] private property is perfectly protected, as it was required it should be by the treaty with Mexico and the law of nations." CONG. GLOBE APP., 31st Cong., 2d Sess. 56 (1851).

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[26] *See also* note 33, *infra*.

[27] RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 141(1) at 433 (1965) contains an illustration directly analogous to Article VIII of the Treaty of Guadalupe Hidalgo:

> "The United States makes a treaty with state A by which A cedes certain territory to the United States. The treaty provides that all grants of land made by A prior to the date on which the treaty is signed 'shall remain ratified and confirmed' to the persons in possession of them. Under the rule stated in Subsection (1), when the treaty becomes binding between the United States and A, it is self-executing and takes immediate effect as domestic law in the United States."

Senator Berrien, a member of the Senate Judiciary Committee when it studied the Act, emphasized the point:

> "By the stipulations of the treaty we have bound ourselves to protect private property. We are about to institute a tribunal to ascertain what that private property is; and, having ascertained it, we are going to give the claimant, whose claim shall be confirmed, the evidence which a patent will afford him that his claim has been decided to be private property before the tribunal we have provided." CONG. GLOBE, 31st Cong., 2d Sess. 429 (1851).

The Act's purpose was to provide a procedure to determine Mexican land claims in California and thereby to separate private land from the public domain over which the United States exercised ownership. S. Ex. Doc. No. 26, 32d Cong., 1st Sess. 2 (1852); CONG. GLOBE, 31st Cong., 2d Sess. 349 (1851) (Sen. Berrien reporting on the action of the Judiciary Committee); CONG. GLOBE, 31st Cong., 2d Sess. 160 (1851) (Sen. Gwin); CONG. GLOBE APP., 31st Cong., 2d Sess. 135 (1851) (Sen. Gwin). This Court echoed that understanding in *Rodrigues v. United States*, 68 U.S. (1 Wall.) 582, 588 (1863):

> "The primary object of the [1851] act was to ascertain and separate the public domain from that which had become, under the Mexican government, private property. . . ."

Congress clearly recognized the strong public interest in prompt and final determinations of private land claims. During the Senate debate on the Act of 1851, Senator Berrien declared:

> "The great object has been that these proceedings should be brought to a close as speedily as possible, in order that the parties might be kept in their rights and the Government should ascertain what was public domain. . . ." CONG. GLOBE, 31st Cong., 2d Sess. 438 (1851).

See also CONG. GLOBE, 31st Cong., 2d Sess. 159 (1851) (Sen. Gwin) ("a final and speedy adjustment of their

claims"). The House Committee on Public Lands reported in 1854 that "The system adopted by this government for the settlement of claims in California, looks to a speedy and final settlement. . . ." H.R. REPT. No. 1, 33d Cong., 2d Sess. 13 (1854).

Although at one time 1851 Act cases occupied "a very heavy disproportion" of this Court's calendar, *Rodrigues v. United States*, 68 U.S. (1 Wall.) 582, 587 (1863), that has not been true in this century. Therefore, a brief exposition of the Act's procedural mechanism is appropriate.

The Act of 1851 created a board of three commissioners to determine the validity of claims to land in California. In order to accomplish its great public object, the Act required all persons "claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government" to present their claims to the Board of Land Commissioners within two years. (§§ 8, 13; P.A. A109, A111-A112.) The Act did "not create a voluntary jurisdiction, that the claimant [might] seek or decline"; rather it "comprehended every species of title or right, whether inchoate or complete," whether perfect or imperfect under Mexican law. *United States v. Fossatt*, 62 U.S. (21 How.) 445, 448 (1859); *Botiller v. Dominguez*, 130 U.S. 238 (1889).

This requirement of presentation applied to state Equal Footing claims in derogation of Mexican grants just as it did to competing private claims. *Knight v. United States Land Association*, 142 U.S. 161 (1891). Any land not claimed within two years, and any land a claim for which was finally rejected, was deemed "part of the public domain of the United States." (§ 13; P.A. A111-A112.) On the other hand, land — including tidelands — determined to be private property never became part of the public domain and, therefore, could not pass to the State under the Equal Footing Doctrine. *Knight v. United States Land Association, supra*, 142 U.S. at 183-184.

At the time the Commissioners embarked on their work it was estimated that there were 93,622,400 acres of land in California, of which 10,000,000, "the finest portion of the State," were claimed by Mexican and Spanish grantees. H.R. REPT. No. 1, 33d Cong., 2d Sess., 4-5 (1854). The enormity and complexity of the task facing them was well summarized by the Land Commissioners themselves in an 1854 report to the Secretary of the Interior:

> "[T]he variety and difficulty of the questions presented in the investigations of these claims are commensurate with their importance to the claimants and the country. . . .
>
> "From almost every source knowledge is required for the proper understanding of these cases. In these investigations questions arise under the national and civil law, expressly made a guide by the act of 3d March, 1851, under the Spanish law, which adopts generally the principles of the civil law, while it repudiates its authority; under the laws and decrees of independent Mexico, after the dominion of Old Spain was cast off; [and] under the acts of the territorial and departmental authorities of California, sometimes the legitimate representatives of the Mexican government, and at others in a state of uneasy rebellion against them. . . . A greater variety of subjects, or a wider field of investigation, was rarely, if ever, open to any tribunal, and the faith of the nation under the treaty of Guadalupe Hidalgo, justice to a conquered people, and a due regard to the provisions of the act of Congress organizing this commission, impose the duty of a careful investigation of the many questions presented in these cases."[28] *Id.* at 5-6.

To facilitate the work of the Commissioners, the 1851 Act required that in presenting their claims, claimants submit all supporting documents and testimony. (§ 8; P.A. A109.) In addition, at the instruction of the General

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[28] These passages also show that the Land Commissioners were well aware of their authority to render binding judgments on all questions relating to California land claims, whether arising under Mexican law or otherwise.

Land Office of the Department of the Interior, S. Ex. Doc. No. 26, 32d Cong., 1st Sess. 4 (1852), the Board of Land Commissioners promulgated regulations requiring all claimants to set forth "the nature and extent of every known interfering claim." COMMISSION FOR SETTLING PRIVATE LAND CLAIMS IN CALIFORNIA, REGULATIONS OF THE COMMISSIONERS FOR THE PRESENTMENT AND PROSECUTION OF CLAIMS 19 (1852). The Commissioners, who had broad judicial powers to compel and take testimony (§§ 6-7; P.A. A109), were then obligated to examine the claimant's evidence, along with that produced on behalf of the United States, and to determine the validity of the claim.[29] (§ 8; P.A. A109-A110.)

In making this decision, the Board was to be governed by "the laws, usages, and customs of the government from which the claim is derived . . . so far as they are applicable." (§ 11; P.A. A111.) Thus, the questions of the validity of a grant — including one for tidelands — under Mexican law and the existence of conflicting governmental claims were for the Commissioners to decide, and "it was a jurisdiction to decide rightly or wrongly."[30] *Thompson v. Los Angeles Farming Co.*, 180 U.S. 72, 77

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[29] The United States was represented in 1851 Act proceedings by a law agent, appointed by the President, "whose special duty it shall be to superintend the interests of the United States." (§ 4; P.A. A108.) In addition to this representation by the United States, at least from 1864 on California itself had the right, if it were "claiming to have an interest in the tract embraced by [a] survey, or in any part thereof," to file with the Surveyor General for California objections to the published survey of any rancho. 13 Stat. 332 (1864).

[30] The California Supreme Court believed that tidelands were inalienable under Mexican law (*Las Siete Partidas*) and therefore "assume[d]" — concededly without any authority — that if alienated, tidelands must be subject to some sort of retained "public trust" interest. (P.A. A9 & note 9; 31 Cal. 3d at 297, 182 Cal. Rptr. at 604, 644 P.2d at 797.) In making this assumption the California court ignored its own 1899 holding that a decision by the Board that land was "subject to absolute alienation" under Mexican law is conclusive. *Harvey v. Barker*, 126 Cal. 262, 277 (1899, *aff'd sub nom. Barker v. Harvey*, 181 U.S. 481 (1901). The determination that Mexican law permitted alienation of tidelands without any retained interest in the government was one properly for the Commissioners to make, and it was made consistently with the view of *Las Siete Partidas* taken by this Court in *Jover v. Insular Government*, 221 U.S. 623, 633 (1911). *See also* note 25, *supra*.

(1901). *See also United States v. Coronado Beach Co.*, 255 U.S. 472, 488 (1921). Once made, that decision was conclusive and not subject to collateral attack. *Id.*

The decisions of the Board of Land Commissioners were subject to direct attack, however. The 1851 Act gave any claimant and the United States the right to a trial *de novo* in the United States District Court. (§§ 9-10; P.A. A110-A111.) *See also Grisar v. McDowell*, 73 U.S. (6 Wall.) 363 (1867). In 1852 this review was made automatic by another act of Congress. 10 Stat. 99 (1852). A dissapointed litigant could appeal the district court's decision to this Court. (§ 10; P.A. A111.)

Following confirmation of the claim, the Surveyor General of California was obligated to have the land surveyed and a plat prepared. (§ 13; P.A. A112.) Upon approval of the survey by the Commissioner of the General Land Office of the United States Department of the Interior, a conclusive federal patent would issue to serve as an "instrument of quiet and security to its possessor."[31] *Beard v. Federy*, 70 U.S. (3 Wall.) 478, 491-492 (1865).

The Mexican grantees of Rancho La Ballona, the Machados and the Talamantes, followed the procedure prescribed by the Act of 1851. They filed a petition and supporting documents with the Board of Land Commissioners on October 2, 1852. (J.A. 19-20.) Among other things, the petition recited that "[t]here is no interfering claim" (J.A. 19), and neither California nor the United States interjected any such claim at any stage of the proceedings. After considering the evidence, the Board of Land Commissioners decreed the claim valid on February 14, 1854. (J.A. 21.) After a *de novo* review, the federal district court held on December 19, 1855 that "the claim of the appellees to a certain tract of land in Los Angeles County, West of the City of Los Angeles — about three leagues, and bordering on the sea shore, called the 'Ballona' is Valid." (J.A. 22.) The appeal of

[31] Even where the underlying Mexican grant is claimed to have been illegal and void, reconsideration of the issue is foreclosed by the decision of the Board of Land Commissioners. *More v. Steinbach*, 127 U.S. 70, 84 (1888).

the United States to this Court was thereafter dismissed, and the order of the district court became final on January 28, 1857. (J.A. 24-25.)

The required survey was made in July 1858 by Henry Hancock, Deputy Surveyor, and approved by the United States Surveyor General's Office in San Francisco on September 18, 1858. (J.A. 26.) The survey was approved in 1873, and the patent issued in that year. (J.A. 101-109.)

The patent issued by the United States to the Machados and the Talamantes did not reserve a "public trust" or any other interest to the State of California. No portion of Rancho La Ballona was found in the 1851 Act proceedings to be part of the public domain. Since the statutory scheme was fully complied with, the unqualified patent confirmed full and complete ownership in the Mexican grantees.

D. The Unqualified Title Confirmed Under the 1851 Act Bars The Assertion of California's Claim Now.

The security of the 1851 Act patent is assured by the Act's requirement that every claim to land in California "by virtue of any right or title derived from the Spanish or Mexican government" be presented to the Board of Land Commissioners for confirmation within two years. *See* p. 20, *supra*. The requirement of presentation was also basic to the 1851 Act's fundamental purpose of providing speedy and final separation of private property from the public domain. During the Senate debate on the Act, Senator Gwin of California asked rhetorically:

> "Unless land claimants are required to present their claims within a specified time, or forfeit them, how can we anticipate a speedy settlement of land claims in California?" CONG. GLOBE APP., 31st Cong., 2d Sess. 61 (1851).

See also CONG. GLOBE APP., 31st Cong., 2d Sess. 130 (1851) (Sen. Gwin). Thus, this Court early held that any claim not so presented was lost:

> "All claims to land that are withheld from the Board of Commissioners during the legal term for presentation, are treated as *nonexistent*. . . ." *United States v.*

Fossatt, 62 U.S. (21 How.) 445, 448 (1859) (emphasis added).

Two decisions of this Court compel the conclusion that California's failure to present its claimed "public trust" interest in the patent proceedings for Rancho La Ballona prevents its assertion at this late date. *Barker v. Harvey*, 181 U.S. 481 (1901), and *United States v. Title Insurance Co.*, 265 U.S. 472 (1924), both involved asserted Indian rights of perpetual occupancy of Mexican grant lands. In *Barker* the Indians relied upon language in a prior grant for part of the land which provided that the grantee "not molest (prejudicar) the Indians," as well as the fact that the grant stated that the grantee could fence the land "without interference with the roads, and other usages (servidumbres)."[32] 181 U.S. at 495. Nevertheless, this Court held that the Indians did not retain their right of occupancy because of their failure to present it in the patent proceeding:

> "If it be said that the Indians do not claim the fee, but only the right of occupation, and, therefore, they do not come within the provision of section 8 as persons 'claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government,' it may be replied that a claim of a right to permanent

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[32] The same provision in the Mexican grant for Rancho La Ballona was relied on by the California Supreme Court for the proposition that "the title of [petitioner's] predecessors was subject to the interests of the public in the tidelands included in the grant." (P.A. A9; 31 Cal. 3d at 297, 182 Cal. Rptr. at 605, 644 P.2d at 797-798.) The state court's reliance on this language is just as misplaced as was the Indians'. The provision "does not mean that the general occupation and control of the property is limited by any so-called servidumbres, but only that such full control shall not be taken as allowing any interference with established roads or cross roads, or things of like nature." *Barker v. Harvey*, 181 U.S. 481, 499 (1901). This 1901 ruling is an obviously more authoritative interpretation of nineteenth century Mexican law than that of the expert relied upon by the court below (P.A. A9), especially since the expert said he had "not acquainted" himself with "detailed provisions" of applicable law "with regard to servitudes" (J.A. 222) and he expressly declined to say whether "a servitude in Mexican law [could] apply to the waters affected by the tides." (J.A. 222-223.) On the contrary, the expert insisted that "a body of water subject to public uses" would never be granted by the Mexican government. (J.A. 223.)

occupancy of land is one of far-reaching effect, and it could not well be said that lands which were burdened with a right of permanent occupancy were a part of the public domain and subject to the full disposal of the United States. . . . *Surely a claimant would have little reason for presenting to the land commission his claim to land, and securing a confirmation of that claim, if the only result was to transfer the naked fee to him burdened by an Indian right of permanent occupancy.*" *Id.* at 491-492 (emphasis added).

The issue of Indian rights of occupancy arose again 20 years later in *United States v. Title Insurance Co.*, 265 U.S. 472 (1924). The grant in that case, like the original grant in *Barker*, stipulated that it was without prejudice to the rights of the Indians. The patent issued on May 9, 1863, however, contained no mention or reservation of Indian rights. Los Angeles County Recorder's Office, Patents, Book No. 1, pp. 5-12 (1863).

In this Court, the federal government, asserting the Indians' right of occupancy, made an argument almost identical to that adopted by the California Supreme Court 60 years later to justify the imposition of the State's "public trust" interest on petitioner's land. Claiming that the Indian right of perpetual occupancy was not a challenge to the Mexican grantee's title, which had been confirmed and patented in the 1851 Act proceedings, the government argued:

> "[T]he Indian title is both legal and equitable in its nature, and has been variously likened to an easement, life estate, trust or use with which the fee is charged. . . . Further, when the fee passes from the Government into private hands under a general conveyance, it is, for the time being, only a naked fee." 265 U.S. at 474.

The Court rejected this argument. It declined the government's invitation to overrule *Barker*, observing that "the purpose of the Act of 1851 was to give repose to titles as well as to fulfill treaty obligations, and that it not only permitted but required all claims to be presented to the commission, and barred all from future assertion which were not presented within the two years." *Id.* at 483. The Court concluded:

"The question whether that decision shall be followed here or overruled admits of but one answer. The decision was given twenty-three years ago and affected many tracts of land in California, particularly in the southern part of the State. In the meantime there has been a continuous growth and development in that section, land values have enhanced, and there have been many transfers. Naturally there has been reliance on the decision. The defendants in this case purchased fifteen years after it was made. *It has become a rule of property, and to disturb it now would be fraught with many injurious results.*" *Id.* at 486 (emphasis added).

The "public trust" rights assertedly reserved to the State — the right to "enter upon and possess" petitioner's land, the right to construct improvements on it, and the right to give the public access to the land — are no less substantial than the right of permanent occupancy asserted in *Barker* and *Title Insurance*. Those rights are indistinguishable from the rights the State retained upon the alienation of tidelands received in fee under the Equal Footing Doctrine. *See* pp. 10-12, *supra*. Just as the Indians in the *Barker* and *Title Insurance* cases had lost their claims by their failure to present them in the 1851 Act proceedings, so is the State barred from now pursuing its asserted "public trust" property interest because the State failed to present its claim in the time and manner required by the Act.

E. In The 1851 Act Proceedings, The United States Conveyed Any Interest It Had And Did Not Secretly Reserve Rights In Petitioner's Land.

Proceedings under the Act of 1851 are conclusive against the United States and all those — like California here — claiming under the United States. (§ 15; P.A. A113); *United States v. O'Donnell*, 303 U.S. 501, 512-513 (1938). In the absence of a reservation in the patent itself, the 1851 Act patent conveyed the entire interest of the United States in the land. *United States v. Title Insurance Co.*, 265 U.S. 472 (1924); *Moore v. Smaw*, 17 Cal. 199 (1861). Since the patent for Rancho La Ballona did not expressly reserve any interest, the California

court's opinion must be based upon the theory that the United States somehow secretly reserved rights in petitioner's land when it patented the land to the Mexican grantees under the Act of 1851. In other contexts, claims of such secret reservations in federal grants have been regularly rebuffed by this Court.

In *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1871), the plaintiff owned land bordering on a navigable stream. The land had previously been conveyed by the United States by patent without reservation. Pursuant to state statutory authority, the defendant constructed a dam, which flooded the plaintiff's land. As part of the defense to the lawsuit, it was claimed that the plaintiff's land came burdened with an easement in favor of improving navigation, which would permit the state to flood the land without payment of compensation. This Court flatly rejected the notion that there could be such a silent reservation in an unqualified patent, saying:

> "We do not think it necessary to consume time in proving that when the United States sells land by treaty or otherwise, and parts with the fee by patent without reservations, it retains no right to take that land for public use without just compensation, nor does it confer such a right on the State within which it lies; and that the absolute ownership and right of private property in such land is not varied by the fact that it borders on a navigable stream." *Id.* at 182.

One hundred years later the federal government itself asserted that there was an "implicit" reservation of an easement over public lands granted to the Union Pacific Railroad. In *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979), the railroad's successors in fee to certain odd-numbered lots in the vicinity of a reservoir area used by the public for fishing and hunting brought an action to quiet title against the United States after the federal government had cleared a road across their land to afford the public access to the reservoir area. The government claimed that it held a silently reserved ease-

ment to pass over the land granted to the railroad in order to reach the land retained by the government, and the Court of Appeals agreed. This Court unanimously reversed, holding that there was no secret reservation in the federal land grant:

> "[B]oth as a matter of common law doctrine and as a matter of construing congressional intent, we are unwilling to imply rights-of-way, with the substantial impact that such implication would have on property rights granted over 100 years ago, in the absence of a stronger case for their implication than the Government makes here." *Id.* at 681-682 (footnote omitted).

If a secret reservation is not recognized where the government disposes of public land over which it has complete dominion, there is even greater reason not to sanction a secret reservation where the United States was under a treaty obligation to protect the property rights of former Mexican citizens. One lower court considered that issue and held that an 1851 Act patent did not contain a silent reservation of a right-of-way for the public over the land.

United States v. Rindge, 208 F. 611 (S.D. Cal. 1913), involved Malibu Ranch, a Mexican land grant about 15 miles north of Rancho La Ballona. Malibu Ranch, which extended from the Pacific Ocean two miles inland where it backed up on public lands in mountain canyons, was patented to private parties under the Act of 1851. In 1907, Mrs. Rindge, the then owner, fenced the ranch in an attempt to keep out members of the public who had been travelling across her land to the adjacent federally-owned lands. The government brought suit to compel the removal of the fences asserting, among other things, "that at the time the patent was issued for the ranch there was reserved by implication to the government and its grantees a right-of-way over the land so patented to the public land back thereof, because there was and is no other practicable way to reach such land from a public highway." 208 F. at 615.

The court found that the doctrine of right-of-way by necessity was not applicable because such an easement was not a physical necessity, but merely a convenience. *Id.* at 619-622. The government's claim that it had silently reserved a public right-of-way was given short shrift by the court:

> "[T]he government owes no duty or obligation and reserves to itself or its subsequent grantees no interest in the land granted except such as may appear on the face of the grant, or the law under which it was made, or be declared by a general statute in force at the time the interest of grantee was acquired." *Id.* at 618-619.

Similarly, had the federal government desired to reserve any rights for itself or the State of California when it confirmed the Mexican grant for Rancho La Ballona and patented the land to its Mexican grantees, the government could readily (although perhaps not constitutionally) have done so expressly.[33] That it did not is ample evidence that no reserved "public trust" interest was intended. To allow a secret reservation of an interest as far-reaching as California's "public trust" to be asserted 100 years after issuance of the 1851 Act patent is to destroy the value of the patent as an "instrument of quiet and security." *Beard v. Federy*, 70 U.S. (3 Wall.) 478, 492 (1865). As this Court said in *United States v. O'Donnell*, 303 U.S. 501, 512 (1938):

> "It is evident that the treaty obligations to quiet title of claimants under Mexican grants would be de-

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[33] At the time the 1851 Act was passed it was widely known that Mexican grants to private parties covered most of the coast of California. Secretary of State James Buchanan mentioned it in a letter transmitted to the House of Representatives along with other papers relating to the Treaty of Guadalupe Hidalgo. H.R. Ex. Doc. No. 50, 30th Cong., 2d Sess. 45 (1849). William Carey Jones also noted it in his report on the condition of land titles in California. S. Ex. Doc. No. 18, 31st Cong., 2d Sess. 34 (1851). Thus, the fact that Congress did not carve public rights to tidelands out of the private property to be confirmed under the Act of 1851 was not a result of ignorance, but that body's choice to live up to the United States' commitment under the Treaty of Guadalupe Hidalgo.

feated and the Mexican Claims Act would fail of its purpose if the finality of the Board's confirmation of claims under Mexican grants could be challenged by persons claiming under grants of public lands by the United States."

II. THE DETERMINATION IN THE 1851 ACT PROCEEDINGS THAT THE LAND WAS NOT TIDELANDS IS CONCLUSIVE AND NOT SUBJECT TO COLLATERAL ATTACK.

The determination by the responsible agency of the federal government in the 1851 Act proceedings that petitioner's land was not an arm of the sea and thus not tidelands provides an independent reason for reversal.[34] The state court's retroactive holding that the property "was an arm of the sea and tidelands at the time California was admitted to the Union in 1850" (P.A. A7)[35] was made in disregard of the contemporaneous conclusion as to the character of the land by the General Land Office of the United States Department of the Interior. As we shall show, the Land Office's determination is conclusive and cannot be overturned at this late date. *See, e.g., Burke v. Southern Pacific R.R. Co.*, 234 U.S. 669, 691-692 (1914); *Gardner v. Bonestell*, 180 U.S. 362, 369-370 (1901).

The confirmatory decrees of the Board of Land Commissioners and the federal district court established not only title to Rancho La Ballona, but also its boundaries, one of which was the "sea coast." (J.A. 21, 22.) After the dismissal of the appeal to this Court in 1857 (J.A. 24-25), the grant was surveyed by Henry Hancock, Deputy Surveyor of the United States, as required by the Act of 1851.[36] The Hancock survey, which showed the shore of

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[34] At that time the term "arm of the sea" was used synonymously with tidelands. *See, e.g., United States v. Pacheco*, 69 U.S. (2 Wall.) 587, 590 (1864).

[35] 31 Cal. 3d at 296, 182 Cal. Rptr. at 603-604, 644 P.2d at 796.

[36] The plat of Rancho La Ballona from the Hancock survey is found at J.A. 26.

the Pacific Ocean as a Rancho boundary, was approved by the United States Surveyor General in San Francisco on September 18, 1858, and forwarded to the General Land Office in Washington, D.C. (D. Ex. A, pp. 62-66.) On March 17, 1860, Commissioner Joseph Wilson of the General Land Office declined to approve the Hancock survey, noting that the survey contained an area just inland from the ocean which was labeled "inner bay." (J.A. 32-34.) He remanded the survey to the Surveyor General for reexamination with directions that, "unless good cause be shown to the contrary," the survey be amended to show the landward shore of the "inner bay," rather than the shore of the open ocean, as the Rancho boundary. (J.A. 34.)

Thus, the question of what constituted the "sea coast" within the meaning of the decrees of confirmation of the Board of Land Commissioners and the federal district court — whether it was the landward shore of the "inner bay" or of the open ocean — was squarely raised in connection with the approval of the survey. In addition, after the survey was subsequently readvertised (J.A. 35-38), in May 1869 a protest was filed by the grantees of Rancho San Vicente y Santa Monica to the north of La Ballona, who claimed that the northern boundary of Rancho La Ballona encroached on the southern boundary of their rancho. (J.A. 39-49.) In the proceedings that followed, the grantees of Rancho La Ballona filed affidavits dealing with the boundary questions raised both by the General Land Office and the protestants.

Three of the affidavits bore directly on the character of the land of the so-called "inner bay." The affidavit of Ignacio Machado, one of the grantees of Rancho La Ballona, stated:

> "Affiant further says that the feature shown on the the map of the Hancock survey as the 'inner bay' is not a bay or arm of the sea, but that in times of storms & floods the waves of the sea close the mouth of the creek with sand, and thus cause the waters to rise and overflow the land. That the waters of said overflow are

fresh and suitable and are used for watering cattle and horses. That at this time nearly all of the land represented as an 'inner bay' is dry land, and is used as pasturage." (J.A. 60.)

The affidavits of Jose del Carmen Sepulveda, the son of the owner to the north, and Tomas Talamantes, another of the grantees, were to the same effect. (J.A. 55, 58.)

In December 1872[37] J. R. Hardenbergh, the United States Surveyor General for California, made a report to Willis Drummond, the Commissioner of the General Land Office, on the survey of Rancho La Ballona. The Surveyor General explained the nature of the "inner bay" as follows:

"Referring to the points of objection set out in the letter of the Hon. Commissioner of March 17, 1860 we are satisfied that he was misled from the true facts of the case by some of the features of the map of the survey before him — that portion of the map marked 'Inner Bay' he evidently considered as a portion of the Sea and not included in the Diseño. . . . By referring to the original Diseño it will be seen that the word 'estero' is found written on the same near the sea shore: this I take to be the same place as that marked on the map of survey 'Inner Bay,' which is formed by the waters of the Ballona Creek and is increased or diminished in extent as the outlet of the same to the sea is more or less choked by the beach sands."[38] (J.A. 111.)

On the basis of the evidence in the case transmitted by Hardenbergh, on April 30, 1873 the General Land Office withdrew its earlier objection and approved the Hancock survey of Rancho La Ballona. (J.A. 84-94.) Commissioner Drummond concluded as follows concerning the "inner bay":

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[37] The handwritten document in evidence is dated December 18, 1873 (J.A. 110), but the year clearly should have been 1872. (*See* J.A. 110; D. Ex. A.)

[38] The Mexican law expert testified below that in the 1830s "estero" referred to "a pool or depression of water which accumulates on a seasonal basis" as a result of storms. (R.T. 1064-1065.)

"The character of this estero, or inner bay as it is marked on the plat of survey, is testified to by Tomas Talamantes, Jose del C. Sepulveda and Ignacio Machado, who in substance say it is not an arm of the sea, and that much of the tract represented as inner bay is suitable for pasturage. That this estero was included in the grant is shown by the *diseño* where the word 'estero' is written near the south boundary and about midway between the east and west boundaries as there represented; and *that it is not an arm of the sea is evident from the field notes and plat of survey which are not contradicted by any evidence in this case,* and which show that what this office in 1860, mistook for the mouth of an estero was meandered on its southeast side to within a few chains of the ocean, and on the east of said meandered line were found high hills, *that this inner bay is not an arm of the sea* and that the mouth of this estero is wholly outside the present survey of the Ballona rancho is also shown by an official survey of the rancho Sansal Redondo which adjoins the southern portion of the eastern boundary of Hancock's survey of Ballona." (J.A. 92; emphasis added.)

On June 12, 1873 the northern rancho claimants took an appeal of Commissioner Drummond's decision to the Secretary of the Interior. (J.A. 95-99.) Because of its impact on the location of the northern boundary, the "inner bay" received lengthy comment in their appeal. (J.A. 96-99.) Like Land Office Commissioner Wilson before them, the contestants asserted that the landward shore of the "inner bay," not the shore of the ocean, was the boundary of Rancho La Ballona. (J.A. 96-97.)

After considering the appeal, Secretary of the Interior Delano on November 17, 1873 affirmed Commissioner Drummond's decision. (J.A. 100.) The federal patent, confirming title to Rancho La Ballona, including the "inner bay," in petitioner's predecessors was issued on December 8, 1873. (J.A. 101-109.)

Thus, the character of the land within the "inner bay" was carefully considered by the General Land Office. Commissioner Drummond expressly found as a fact —

and the Secretary of the Interior affirmed his decision — that the "inner bay" on petitioner's land was not an arm of the sea and thus not tidelands.

The correctness of the Land Office determination is shown by the very evidence respondents introduced at trial to attempt to impeach that finding. Although respondents' expert, Professor Orme, testified that Ballona Lagoon was "entirely open to the sea" at the time of its creation 5,000 to 10,000 years ago (J.A. 164), he went on to say that "almost immediately sea level [was] established, [and] sand began drifting along the shore from the north to build out the beginnings of a barrier spit." (*Id.*)

By about 1450 A.D., the open lagoon had been transformed into a "barrier lagoon system," and "at about this time it may be quite likely that the barrier closed entirely across . . . a characteristic of barrier lagoon systems worldwide." (J.A. 166-167.) The barrier could be closed for "a matter of days, perhaps weeks — but certainly, for the most part, not more than a few months." (J.A. 175.) The closed barrier would subsequently be "breached by flood waters draining from the land." (J.A. 167.) Finally, "By the 19th Century it would appear that sediments had been fed into the lagoon to the extent that the area of [open] water was now substantially diminished." (*Id.*) The 1876 map relied upon so heavily by respondents and the lower court (J.A. 123) shows that most of the area depicted on the Hancock survey as the "inner bay" is mud flats and salt marsh, and that what water appears is the result primarily of the flow of freshwater rivers through the area to the ocean. (J.A. 144-145, 156.)

This picture of the "inner bay" as mud flats, salt marsh and fresh water pools whose outlet to the ocean was frequently closed for perhaps months at a time is entirely consistent with the affidavits before the Land Office and Commissioner Drummond's determination that the "inner bay" was not an arm of the sea. It is completely

inconsistent with the federal definition of tidelands, as expressed by this Court in *San Francisco v. LeRoy*, 138 U.S. 656, 671-672 (1891):

> "To render lands tide-lands, which the State by virtue of her sovereignty could claim, there must have been such continuity of the flow of tide-water over them, or such regularity of the flow within every twenty-four hours, as to render them unfit for cultivation, the growth of grasses, or other uses to which up-land is applied."

The evidence before the Land Office as well as that adduced by respondents below shows that the "inner bay" was not subjected to the regular ebb and flow of the tide. At most, the barrier beach was occasionally overwashed with ocean waves. According to the 1876 map, much of the area would have been covered with grassy plants (*see* J.A. 140), and the 1870 affidavits submitted to the Land Office attested to the fact that the Mexican grantees' cattle grazed this land. *See* pp. 32-34, *supra*. Indeed, respondents' own expert opined that the first "significant impact" on the area by man may have been in the eighteenth or nineteenth century and "may have been associated . . . with cattle stomping in the salt marsh and pummeling the barrier beach and generally watering themselves in the briny." (J.A. 179.)

Under the Act of 1851, the General Land Office had unquestionable jurisdiction to determine the character of the "inner bay." *Compare Knight v. United States Land Association*, 142 U.S. 161, 182-184 (1891), *with Borax, Ltd. v. Los Angeles*, 296 U.S. 10, 16-21 (1935). Defining the character of land for purposes of patent inclusion constitutes a determination of fact. *Burke v. Southern Pacific R.R. Co.*, 234 U.S. 669, 691-692 (1914) ("when a patent issues it is to be taken, upon a collateral attack, as affording conclusive evidence of the . . . character of the land"). As early as 1898 this Court was able to say:

> "[I]f there is any one thing respecting the administration of the public lands which must be considered as settled by repeated adjudications of this court, it is

that the decision of the land department upon mere questions of fact is, in the absence of fraud or deceit, conclusive, and such questions cannot thereafter be relitigated in the courts." *Johnson v. Drew*, 171 U.S. 93, 99 (1898).

This rule of conclusiveness is fully applicable to findings made by the General Land Office in the course of an 1851 Act proceeding. *See Gardner v. Bonestell*, 180 U.S. 362, 369-370 (1901) ("the determination of the Land Department in a case within its jurisdiction of questions of fact depending upon conflicting testimony is conclusive, and cannot be challenged by subsequent proceedings in court"); *More v. Steinbach*, 127 U.S. 70, 83 (1888).

Attempting to avoid the conclusiveness of the federal determination that petitioner's land was not tidelands, the California Supreme Court conjured up what it termed an "obvious ambiguity." (P.A. A7.)[39] To find the ambiguity" the California court pointed to a 1951 dictionary definition of "bay," which the court thought indicated that the "inner bay" referred to on the Hancock Survey was an "inlet of the sea." (*Id.*) Since the Land Office's determination was inconsistent with this definition, the court said that there was an "ambiguity." But concern as to the character of the "inner bay" was what caused the Land Office initially to remand the survey for examination of that very question. Its subsequent determination that the uncontradicted evidence established that the "inner bay" was "not an arm of the sea" is anything but ambiguous. Thus, the California court's reexamination of the 1850 character of the land to retroactively decree a major property interest incompatible with the unqualified title confirmed by the General Land Office violates the fundamental principle of the conclusiveness of patent determinations.

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[39] 31 Cal. 3d at 296, 182 Cal. Rptr. at 603, 644 P.2d at 796.

CONCLUSION

For all of the foregoing reasons, the judgment of the Supreme Court of California should be reversed and the case remanded for further proceedings consistent with the decision of this Court.

Respectfully submitted,

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NOTE TO STATE LANDS COMMISSION MAPS
"These maps have been prepared to show where the public trust may exist. If an application is received for lands within the outlined area it should be referred to the State Lands Commission for a determination of whether the lands in question are in fact subject to the public trust.
"This plat has not been approved by the State Lands Commission and does not establish boundary lines of any State-owned lands depicted thereon.
"This plat is subject to change and may not include all lands subject to the public trust. Any questions which arise should be directed to the State Lands Commission."
1961 United States Department of the Interior
Geological Survey Map, Venice Quadrangle,
with California State Lands Commission
"Public Trust" Line Superimposed
Venice
VENICE BEACH
MARINA DEL REY
B A L D W I N
PLAYA
AVALON
Playa del Rey
Breakwater
Light
Gas Wells